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# МОРСЬКЕ ПРАВО

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## LEGAL CONSEQUENCES OF OCEAN CHANGE IN THE SOUTH PACIFIC – OUTLINE OF THE PROBLEM

### ПРАВОВІ НАСЛІДКИ ЗМІН ОКЕАНУ У ПІВДЕННО-ТИХООКЕАНСЬКОМУ РЕГІОНІ – НАРИСИ ПРОБЛЕМИ

#### ABSTRACT

Global climate change scenarios are seen as future concerns, but this is not the case for the Pacific island countries and territories. The natural sciences have already built substantial knowledge about the oceanographic, geological and atmospheric processes associated with global warming and ocean change. Nonetheless, deep views from the social sciences, as well as legal perspective, need to be collected, analysed and executed, in order to know what happens when the climate change effects threaten the viability of sovereign states. Small island developing states contributed the least to global warming, yet they are suffering the most from its effects, while legal consequences of losing the most or all of their territory will lead those nations to the threat of losing sovereign status in the international arena. The

Pacific Ocean, being the largest water basin on Earth, remains an isolated region in terms of geopolitics and research. This article is therefore a modest attempt to collect models and scenarios of the future of the Pacific states concerning their full existence as the equal legal entities, but also to present some international law proposals in this matter. Secondly, its goal is to sensitize European readers to certain issues of the geographically remote South Pacific, which might eventually affect all of us.

*The key words:* climate change, ocean change, Pacific, South Pacific, legal consequences.

## **Introduction**

The attempt of this article is to present legal consequences of ocean change, intentionally used term instead of “climate change”, in the region of South Pacific. It is indisputable that changes in Earth’s environmental system are now one of the biggest threats facing humanity. Albeit most of the new weather patterns are predicted to occur in the future, small island states across the globe are already experiencing some of these harms nowadays. If the meteorological and geological predictions become truth, loss of territory, and therefore sovereignty of the submerged states might happen too. Energy choices made by the global leaders at both national and global level can in fact mitigate but also exacerbate the climate threats to the most vulnerable nations, being affected by ocean change directly. Here needs to be underlined that low-laying countries, poor developing island nations are totally depended on the decision-makers at the universal forums level. Small island developing states (SIDS) contributed the least to global warming, yet they are suffering the most from its effects. For the Pacific SIDS (PSIDS) future climate change, expected by the Western politicians and scientists, is happening already now. The microstates in the South Pacific like the Federated States of Micronesia (FSM) are threatened by tidal surges, coastal erosion, submersion of theirs atolls, destruction of food crops, reduced potable water supply, and harm to marine species because of the rising sea temperatures (Gerrard, Wannier, 2013).

The Pacific Ocean, being the largest water basin in Earth remains an isolated region in terms of geopolitics and research. The legal consequences of the potential loss of sovereignty or proposed solutions at the international law level require further analysis and discussion in both academia and multilateral diplomacy. This article is therefore a modest attempt to collect opinions of the future of the Pacific states in terms of their full existence as the equal legal entities, as well as to sensitize European readers to certain issues of the geographically remote South Pacific.

## 1. Ocean change in the Pacific

The Pacific Ocean covers a third of the Earth's surface and is home to about 10 million islanders. "Oceania" is not a legal term; therefore, it is indeed hard to find its definition. Nonetheless, this is how the inhabitants of the South Pacific prefer to call its home region, what in turn represents its huge cultural and biological diversity (Hau'Ofa, 1944; Lal, Fortune, 2000). Oceania islanders, "people of the sea", perceive the ocean not only as their home, but also as foundation of their very existence, mainly in term of migratory maritime sources, being tuna (D'Arcy, 2006). From the law of the sea perspective, the undeniable question arises when it comes to the 200-nautical miles Exclusive Economic Zone (EEZ). Changes in climate affect sea level and contribute to loss of territory, relocation of maritime zones, and general uncertainty and instability. In accordance to the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982 (nevertheless ratified already in 1994) islands are legally determined, as well as baselines of EEZs are. Such baselines in turn are of huge extent, and are in fact disproportionate to the tiny land of the Pacific islets (Jedrusik 2005). What should not surprise, is the natural, almost automatic reference of the Pacific people's sovereignty towards the(ir) ocean. Such maritime connection, reflecting "Pacific world views" (Hvidig 2003), is expressed in the title of this article, naming the biggest challenge of humanity as ocean change.

Without going into non-legal analysis, the basic facts of ocean change have to be recalled here. The ocean is now being extremely impacted by increasing carbon dioxide and other greenhouse gas emissions (GHG) from human activities. This in consequence causes changes in water temperature, ocean acidification and deoxygenation. Those chemical reactions lead to changes in oceanic circulation and general chemistry, but also rising sea levels, increased storm intensity, and finally changes in the diversity or even abundance of marine species. From the economic security vantage point, it is also important to be aware of degradation of coastal and marine ecosystems. Ocean change weakens the ability of the ocean and coasts to provide critical services such as food, carbon storage, oxygen generation, as well as to support nature-based solutions to climate change adaptation (only to mention coral reefs, seagrass and mangroves). According to the International Union for Conservation of Nature: "The sustainable management, conservation and restoration of coastal and marine ecosystems are vital

to support the continued provision of ecosystem services on which people depend. A low carbon emissions trajectory is indispensable to preserve the health of the ocean” (IUCN, 2017). However, not only the health of the ocean, but of people living there, by providing most of the oxygen we breathe. Additionally, the oceans have absorbed more than 90 % of the warming created by humans since the 1970s. Unfortunately, there must be a limit to how much the ocean is able to absorb, and according to the scientists, such limit is beginning to show (Laffoley, Baxter, 2016).

Although there is a common recognition that sea-level rise is happening now, it is still uncertain by how much and how quickly the level will rise. The growing concerns are being presented relating to sea-level rise; the situation might have the potential to accelerate, where severe flooding, drought and extreme weather will make coastal areas (literally whole territory of PSIDS) gradually inhabitable. By submersion of urban centres, overpopulated already now with a high rate of unemployment, migrations of displaced people along with related socio-economic consequences will apply (Nicholls, Cazenave, 2010).

Such global climate change scenarios are seen as future concerns, but this is not the case for the Pacific islanders of coral atolls. They are experiencing damage now. Furthermore, they are the world’s ocean change frontline. That is why very often scientists and decision-makers refer to the Pacific nations as being vulnerable (Barnett, Campbell, 2010; Overton, 1993). The Pacific region is vulnerable due to three correlated factors, which are smallness, fragmentation (three varied subregions of Melanesia, Micronesia and Polynesia), and isolation. Its limited environments are indeed fragile and ocean-dependent, becoming (or remaining rather) vulnerable to a wide range of hazards. Those hazards are, only to name a few, both regional and global: pollution, non-existent waste management, soil erosion, prompt population growth and overpopulation on the coastal areas, especially capital cities, internal and external migrations, foreign remittances and postcolonial dependence on foreign aid, changing market prices for commodities, lack or insufficient infrastructure at the Pacific harbors and airports (Siekiera 2015).

This unprecedented on global scale situation leads to putting into real danger small island states in the Pacific. Especially four of low-lying countries of Kiribati, the Marshall Islands, Tokelau and Tuvalu are projected to lose most or even whole of their territory by the end of the 21<sup>st</sup> century (UNHCR 2009 and 2011). In order to give an example, one islet of the FSM has vanished,



another one in Pohnpei State (one of the four states of the Federated States of Micronesia) has split because of coastal erosion, while two islands in the Chuuk State have been submerged (Gerrard, Wannier, 2013; Kubota, 2001).

## 2. Legal consequences

The FSM and other Pacific counties<sup>1</sup> cannot afford to wait though. To ensure own international existence as nations they need to, and already do, stick for emerging legal principles, as well as to use existing international law arrangements. As the ocean change effects are unprecedented, this situation requires also unprecedented approach toward legal and extrajudicial mechanism, both soft law and hard law tools, which could become more effective in addressing impact of climate change.

Very existence of several, not to say to all, PICT, is endangered by rising seas, which implies other biological, social, and economical consequences enumerated in the previous part of this article. It has to be noted that losing a part or whole of the state's territory opens up the international legal discussions of indeed myriad legal dilemmas. If a nation without a territory can still be called as a state? Or does it possess rights and obligations of a state, in accordance with the Montevideo Convention from 1933<sup>2</sup>? What about its EEZ, as there will not be anymore any baseline in relation to which there equivalent nautical miles could be calculated? What about the population of such submerged state, who would lose (or not) their citizenship in a hosting country? What would be a legal status of those displaced people? As there is not any international agreement on climate change displaced people, should the United Nations (UN) draft one and reach its binding ratifications? Or, due to over-fragmentation of legal procedures, among which a vast majority are not fully implemented, intentionally or not, should we stick to already existing norms? Is it better to create more hard law, or perhaps become more flexible to customary law, what in turn would require different approach toward legal culture? Finally, as there is no such thing as universal sanction system or international high

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<sup>1</sup> Not every international law entity at the Pacific region can be called as a state in accordance with the doctrine. The South Pacific comprises of sovereign states, free-associated states, and dependent territories. Therefore, the term "country" instead of "state" when referring to the Pacific region reflects the actual and legal state of affairs. Thus, another acronym was merged for the Pacific nations – PICT, being an abbreviation for the Pacific island countries and territories.

<sup>2</sup> Montevideo Convention on the Rights and Duties of States of 26 December 1933.

court, could the injured PSIDS have any recourse for compensation from the most polluting states?

The tragic situation of the Pacific island countries and territories creates much more than just enumerated above questions. The intention of this article is also not to look for the answers, as leading legal scholars, politicians, activists do not agree with one another. Most importantly, though, is becoming aware of the possible, hence already existing, legal implications, which might probably appear in the nearest future of Oceania. Among many consequences disastrous of ocean change to the PICT, national claims to maritime jurisdiction seem to be of a huge importance. Islands face the dire prospect of inundation and thus the loss of their status as states. Before that, the economic and legal consequences of sizing down EEZs are losing jurisdictional rights over the natural resources, as well as maritime migratory sources.

The Pacific Ocean comprises of about 25,000 islands, so more than all other water bodies combined. Still, the definition of an island appears not suitable for the upcoming ocean change, especially as the current state of international law might not be satisfying for the submerging Pacific nations. Art. 121(1) of UNCLOS states that, “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” Such defining features have in fact a significant impact when generating extensive maritime claims to jurisdiction (Schofield, 2009). It is worth here using an example, where a rock cannot be understood as equal to an island and therefore is not able to have an EEZ or any rights to continental shelf<sup>3</sup>. An island could generate 431,014 km<sup>2</sup> of territorial sea, exclusive economic zone, and continental shelf rights, when having no maritime neighbour within 400 nm. In contrast, if such island would be deemed a rock, it will be incapable of generating any EEZ, while only “modest” 1,550 km<sup>2</sup> of territorial sea could be claimed (Schofield, 2009).

Scientists, politicians, activists and legal advisers are fully aware that UNCLOS was not prepared for the case of disappearing land, thus it does

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<sup>3</sup> Art. 76(1) of UNCLOS states: “The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.”

not provide any provisions what are the rights (and obligations accordingly) when the maritime components of Pacific nations may be lost through the rise of the ocean. PSIDS' sovereignty, as well as financial viability (60% of the world's tuna, which migrate through the Pacific EEZs) are primarily grounded in the ocean. This very basic, and indeed crucial for existence of the islanders, question of what would happen with the EEZ of a totally submerged island nation was raised by then Ambassador of the Marshall Islands to the United Nations, Phillip H. Muller. Here the famous comparison of a Pacific state as "a canary bird of global warming and sea level rise" was used as well (Gerrard, Wannier, 2013).

Sovereignty of the Pacific nations and their economic force being enormous EEZs are two indeed important legal questions. But how about the people living on the coral atolls? Public opinion, especially through media, already knows the terms such as "environmental refuges", "climate refugees" or "climate migrants". Though, those are not legal definitions, which cannot (at this moment) be binding by any party, regardless if those would be the hosting states, intergovernmental organizations (IGO) or private sponsors. And even though the main global IGOs dealing with the status of displaced persons, namely the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IMO), accept the use of the word "refugee" towards the migrants displaced by the effects of environmental change, none of them decided to codify this definition. Why? Legal scholars themselves argue that a particular category of refugees is already defined by the 1951 Convention Relating to the Status of Refugees, and therefore it does not apply to climate change per se. Art. 1A requires fulfilling basic conditions by a person who can be called a refugee. Those prerequisites consist of: being persecuted, must have crossed an international boarder, and being unwilling to use the protection of own country<sup>4</sup>. None of those applies to people from the submerged islands.

Regrettably, Western analytics tend to forget that most displacement will likely to occur within national borders. The international arrangements and informal discussion being made on the highest universal level are strongly focused on international movements, while forgetting about the enormous territories of the Pacific small islands, which maritime territory is in fact broad. What has to be added here

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<sup>4</sup> Compare Art. 1A(b) of the Convention.

is culture of the Pacific nations, who are connected to their land and sea as their heritage, and do not see the threat like it is being presented (and officially proposed in New York or Brussels). “We are a proud nation of people, we are a unique culture which cannot be relocated to somewhere else” said then Prime Minister of Tuvalu, Apisai Ielemia during the 13th session of the Conference of the Parties (COP 13) in Poznan, Poland (Barnett, Campbell, 2010).

### **3. Propositions**

As it was mentioned above, little attention is given to what is expressed and hoped for by the Pacific islanders. Any proposals and strategies made by the Pacific governments and their activists should take centre stage – in local, regional and global negotiations. Indeed very often in international law the regional regimes becomes a sufficient, less expensive and far quicker solution for the local problems and dilemmas. Therefore, regionalization *de facto* and regionalism *de jure*<sup>5</sup> seem to be indeed a good way out from ocean change threats to PSIDS. Already now, the Pacific governments (“Pacific bloc” within the UN) started to speak with the common voice in order to be more heard out by the global powers. Despite establishing own regional agreements<sup>6</sup>, indeed ambitious nonetheless not binding, Pacific bloc engaged itself into climate change diplomacy, with considerable success. During COP 21 in Paris it managed to convince states to approve the agreement on keeping a global temperature rise in the 21st century below 2 degrees Celsius above pre-industrial levels (Paris Agreement 2015). Forming PSIDS within the UN also formally helped its members to command global stages in favour of the most vulnerable (Fry, Tarte, 2015).

In the term of the new (and more suitable for the dynamic situation of ocean change) EEZ definition, the Pacific states have come with a submission to UNCLOS. They are also in the process of seeking improved

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<sup>5</sup> The author intentionally uses such differentiation, as the Pacific is still at the stage of regionalism that is region-building through less formal initiatives, while not yet at the level of formally binding institutions, being able to execute the regional norms and harmonize the law (regionalism).

<sup>6</sup> Only to name a few: Pacific Island Development Forum Suva Declaration on Climate Change from 4 September 2015, Pacific Islands Forum Declaration on Climate Change Action from 10 September 2015, Majuro Declaration, Pacific Islands Forum Majuro Declaration for Climate Leadership from 17 July 2008.

legal recognition of the zones during the complex and highly relevant BBNJ negotiations in the UN. “Biodiversity Beyond National Jurisdiction” became the topic of the international discussion and next it was codified in a form of the UN General Assembly Resolution in 2017<sup>7</sup>. What could be expected when taking into account the Pacific approach towards the common interests is the fact that PSIDS do speak with one voice. This also does not involve conflicting claims to the neighbour states’ waters. They prefer to opt for the “high seas pockets”, where the open sea should be jointly used by the Pacific nations, while not being (illegally) overfished by the foreign (much more technologically developed) vessels. Such overuse of the maritime sources in the Pacific basin also applies to seabed mining (D’Arcy, 2006).

Law of the sea, as we have nowadays, is not equipped for dealing with the enumerated above challenged of sea level rise or maritime limits. Scientists, especially international lawyers, consider applying stable baselines instead of ambulatory ones, which would contribute to combat losing territory by the submerged islands, relocation of maritime zones, and the general uncertainty and instability in the world order (Busch, 2018; Caron, 2009; Schofield, 2009; et al). As a costal state enjoys various degrees of sovereignty, drawn based on a criterion measured from the baselines, it is all now up from two provisions from UNCLOS: marked low-water lines, and charts officially recognize by the costal state<sup>8</sup>. This means that baselines will shift due to the normal costal realignments, and therefore are called as ambulatory baselines, while the maritime zones as shifting ones. This is not for the benefit of the Pacific submerging islands. Stable baseline along with recognition of the most favourable charts seem to be one of the legal responses on this problem.

Very often the propositions of the amendments of the contemporary legal regime, or at least its annexation, are putting forward (Gerrard, Wannier, 2013; Warner, Schofield, 2012; et al). This also applies for creating a new category of environmental refugees, who now were named as “climate

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<sup>7</sup> The full title being: International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction of 24 December 2017 (A/72/L.7).

<sup>8</sup> Art. 5 of UNCLOS states: “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State”.

change displacement persons” (CCDP)<sup>9</sup>. Nonetheless, there is an essential legal gap in relation to CCDP, as even the main international instrument for addressing the effects of climate change – the United Nations Framework Convention on Climate Change (UNFCCC) from 1992 – leaves it aside. Also, would establishing a single, multilateral international agreement solve this gap? Here opinions are divided too. Any internationally binding treaty in order to become valid needs its ratification to be made. Instead we can observe the enormous lack of political will by the states to voluntarily put on themselves more burden streaming from another treaty. The single process of negotiation, drafting, signing, and internal implementation to national legal systems takes a while, while the submerging Pacific states cannot wait that long, with no guarantee of success. Thus, there is another way of the doctrine within international law of customary practice and adjusting the already existing norms to new case situations.

The nation *ex situ* is likewise another aspect of changing the doctrinal, traditional approach to territorialized state, in accordance with the Montevideo Convention. So-called deterritorialized states, outside their primary place of existence (*ex situ*) are able to maintain their heritage and remain an equal partner on the international arena, while not losing its indeed vital position as a sovereign state (Burkett, 2011; Rayfuse, 2010). Such new category of international personality would also need recognized international legitimacy.

## **Conclusions**

The article presented an outline of the indeed varied, multidisciplinary and multilayer consequences of ocean change concerning the South Pacific island states. The legal dilemmas can be stored into three main groups: those relating to the theoretical approach to sovereignty of the submerged states; international legal and economic consequences of diminution or final deprivation of the exclusive economic zones, and finally a legal status of the people forced to leave their places of residence due to the rising sea level. Both scholars, politicians and activists, at the regional

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<sup>9</sup> This term, however, is not a legal term, as even the International Organization for Migration (IOM) does not use it in its latest legal mechanism. Compare: Implementation of the Workplan of the Task Force on Displacement under the Warsaw International Mechanism for Loss and Damage: Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in International Processes, Policies and Legal Frameworks from 2018.

and global level put together arguments, albeit mostly incompatible ones. For some the best way to adjust the contemporary state of international law is to draft a new multilateral treaty, while others prefer to rely on soft law tools, such as diplomacy, customary norms and different, that is more flexible and open, approach. What is lacking is the Pacific vantage point, which in fact should be taken into consideration at the very first place. The propositions, scenarios and legal drafts have to be analysed, approved and implemented by the PICT governments and their citizens in order to become fully successful. The (legal) future of Oceania can eventually be relevant to other low-lying coastal areas worldwide. Being a canary bird of global warming and ocean change, PICT's dramatic situation should not leave impassive other global actors in the international arena.

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## АНОТАЦІЯ

**Сієкієра Й. Правові наслідки змін океану у Південно-Тихоокеанському регіоні – нариси проблеми. – Стаття.**

Глобальні сценарії зміни клімату розглядаються переважно як проблеми майбутнього, але це не стосується тихоокеанських острівних країн та територій. Природничими науками уже набуто значних знань про океанографічні, геологічні та атмосферні процеси, пов'язані з глобальним потеплінням та змінами океану. Тим не менш, на теперішній час все ще необхідно зібрати, проаналізувати та здійснити дослідження у сфері соціальних наук, а також з правової точки зору, з метою визначення наслідків змін клімату, що загрожують життєздатності суверенних держав. Невеликі острівні держави, що розвиваються, сприяли глобальному потеплінню, але вони й найбільше страждають від його наслідків. Правові наслідки втрати більшої частини чи взагалі всієї їх території приведуть ці країни до загрози втрати суверенного статусу на міжнародній арені. Тихий океан, будучи найбільшим водним басейном на Землі, залишається ізольованим регіоном з точки зору геополітики та досліджень. Тому ця стаття є спробою зібрати моделі та сценарії майбутнього тихоокеанських держав щодо їх повноцінного існування як рівноправних юридичних осіб, а також представити деякі пропозиції до сучасного міжнародного права у цьому питанні. По-друге, його мета полягає також у приверненні уваги європейських читачів до окремих питань географічно віддаленого півдня Тихого океану, які можуть врешті решт торкнутися усіх нас. Автором було окреслено різноманітні багатопрфільні та багатозарові наслідки зміни океану, що стосуються Південно-Тихоокеанських острівних держав. Юридичні проблеми у дослідженій сфері автор розподіляє на три основні групи: ті, що стосуються теоретичного підходу до суверенітету прибережних держав; міжнародно-правові та економічні наслідки зменшення чи остаточного позбавлення виключних економічних зон, і, нарешті, правовий статус людей, змушених залишити місця проживання через підвищення рівня моря.

**Ключові слова:** зміна клімату, зміна океану, Тихий океан, Південно-Тихоокеанський регіон, правові наслідки.

## АННОТАЦИЯ

*Сиекиера Й. Правовые последствия изменений океана в Южно-Тихоокеанском регионе – очерки проблемы. – Статья.*

Глобальные сценарии изменения климата рассматриваются преимущественно как проблемы будущего, однако это не касается тихоокеанских островных государств и территорий. Естественными науками уже приобретены значительные объемы знаний об океанографических, геологических и атмосферных процессах, связанных с глобальным потеплением и изменениями океана. Тем не менее, в настоящее время все еще необходимо собрать, проанализировать и провести исследования в области социальных наук, а также с правовой точки зрения, с целью определения последствий изменений климата, угрожающих жизнеспособности суверенных государств. Небольшие островные развивающиеся государства способствовали глобальному потеплению, но они и больше всего страдают от его последствий. Правовые последствия потери большей части или вообще всей их территории приведут эти страны к угрозе утраты суверенного статуса на международной арене. Тихий океан, будучи крупнейшим водным бассейном на Земле, остается изолированным регионом с точки зрения геополитики и исследований. Поэтому данная статья является попыткой собрать модели и сценарии будущего тихоокеанских государств относительно их полноценного существования как равноправных юридических лиц, а также дать некоторые предложения по усовершенствованию современного международного права в этом вопросе. Во-вторых, его цель заключается также в привлечении внимания европейских читателей к отдельным вопросам географически удаленного юга Тихого океана, которые могут в конце концов коснуться всех нас. Автором были обозначены различные многопрофильные и многослойные последствия изменения океана, касающиеся Южно-Тихоокеанских островных государств. Юридические проблемы в исследованной области автор распределяет на три основные группы: касающиеся теоретического подхода к суверенитету прибрежных государств; международно-правовые и экономические последствия уменьшения или окончательного лишения исключительных экономических зон, и, наконец, правовой статус людей, вынужденных покинуть места проживания из-за повышения уровня моря.

**Ключевые слова:** изменение климата, изменение океана, Тихий океан, Южно-Тихоокеанский регион, правовые последствия.

